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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ZHELIN ZHAO & YINGCHEN SUN,)	Case No.: 5:22-cv-01401
)	
Plaintiffs,)	Agency No.: A 208 467 163
)	A 208 467 164
vs.)	
)	COMPLAINT FOR DECLARTORY AND
Dir LA Asylum Ofc; Dir LA Dist;)	INJUNCTIVE RELIEF, AND FOR A
USCIS; Dir USCIS; Sec DHS; US)	WRIT IN THE NATURE OF MANDAMUS
AG,)	TO COMPEL DEFENDANTS'
)	DETERMINATION OF PLAINTIFFS'
Defendants.)	APPLICATION FOR ASYLUM
)	

JURISDICTION AND VENUE

1
2 1. This Court has jurisdiction pursuant to 28 USC §1331,
3 this action being one that arises under the Constitution and laws
4 of the United States (specifically the Fifth Amendment, the
5 Immigration and Nationality Act ("INA"), 8 USC §§1101 et seq., as
6 amended, in particular 8 USC §1158(d)(5)(A)(1)(ii), [§1158(d)(7)
7 notwithstanding], and the Administrative Procedures Act ("APA"), 5
8 USC §§551 et seq., as amended, in particular 5 USC §§555 and 701-
9 706); pursuant to 28 USC §1361, this action being in the nature of
10 mandamus to compel officers and employees of the United States to
11 perform duties owed to Plaintiffs, and pursuant to 5 USC §706,
12 this action being one invoking the Court's jurisdiction to compel
13 agency action unlawfully withheld and unreasonably delayed.

14 2. Defendants, did not properly exercise their authority
15 under the APA, violating their duty under that statute. In
16 addition, Defendants did not inform Plaintiffs that although they
17 filed their application as a time when FIFO (First-in, First-out)
18 processing was in effect, the new LIFO (Last-in, First-out) would
19 be applied to them, thereby violating Plaintiffs' due process
20 rights under the 5th amendment to the U.S. Constitution.

21 3. Declaratory judgment is sought pursuant to 28 USC
22 §§2201-2202.

23 4. Plaintiffs allege eligibility for attorney's fees,
24 related expenses and costs pursuant to the Equal Access to Justice
25 Act ("EAJA"), 28 USC §2412.

26 5. Venue is proper in this Court, pursuant to 28 USC
27 §1391(e), in that this is an action against officers and
28 agents/employees of the United States in their official

1 capacities, brought in the District where a Defendant resides and
2 where a substantial part of the events or omissions giving rise to
3 Plaintiffs' claims occurred. More specifically, Plaintiffs' form
4 I-589 application for asylum was properly filed and remains
5 pending with the USCIS Los Angeles Asylum Director.

6 PARTIES

7 A. Plaintiffs

8 6. Plaintiffs Zhelin Zhao & Yingchen Sun, husband and wife,
9 are citizens of the People's Republic of China, are residents of
10 Los Angeles County, California; and applicants for asylum [form I-
11 589] 8 U.S.C. §1158 et seq., INA §208 et seq.

12 B. Defendants

13 7. Defendant Director of the Los Angeles Asylum Office for
14 the U.S. Citizenship & Immigration Services ("USCIS") of the Los
15 Angeles District, is charged under law to implement and enforce
16 the Immigration & Nationality Act ("INA") and related regulations
17 as they relate to asylum.

18 8. Defendant District Director of the Los Angeles District
19 of the USCIS is charged under the law to implement and enforce the
20 Immigration and Nationality Act ("INA"). The USCIS is a federal
21 agency within the United States Department of Homeland Security
22 ("DHS") which is charged under the law to implement and enforce
23 the INA and related regulations.

24 9. Defendant U.S. Citizenship & Immigration Services
25 ("USCIS") is a federal agency within the United States Department
26 of Homeland Security and is charged under the law to implement and
27 enforce the INA and related regulations.

1 she had been retained by Plaintiffs to take over representation on
2 their case that had been pending since September 17, 2015. She
3 also asked to update the plaintiffs' mailing address and further
4 stated that she looked forward to receiving notification of their
5 interview in the near future.

6 17. On or about March 10, 2022, Plaintiffs' Attorney Ms.
7 Flores received an email from Defendant USCIS' Los Angeles Asylum
8 Office stating: "Per your request, we've added your representation
9 to Zhelin Zhao's case in the asylum base and have added his
10 mailing address as: 8651 AUTUMN PATH ST, CHINO CA 91708."

11 18. On or about March 09, 2022, Defendant USCIS issued an
12 automated email response which stated that a "Stand-By List" had
13 been closed as of 02/16/2021. It also stated that the inquiry had
14 been received and would be answered in 15 days. It went on to
15 state "USCIS schedules asylum interviews in the following priority
16 (as summarized):

17 *First priority: Applications that had already been
18 scheduled, but that had to be rescheduled.

19 *Second priority: Applications that have been pending 21 days
20 or less.

21 *Third priority: All other affirmative asylum applications
22 will be scheduled for interviews **starting with newer filings and**
23 **working backward to older filings.**" (Emphasis added).

24 A copy of the above-mentioned emails, paragraphs 16-18 is
25 attached hereto as part of collective Exhibit B.

26 19. On or about Aug. 8, 2022, an online case status inquiry
27 through Defendant USCIS' website was done. The results stated:

28 "NEXT STEP IS AN INTERVIEW

1 The next step in your application is an in-person interview.
2 Once we have scheduled your interview, you will receive an
3 interview notice..." Case Status Online

4 A copy of this online case status inquiry is attached hereto
5 as part of collective Exhibit C.

6 20. To date, Defendants have not issued an interview notice
7 on Plaintiffs' Form I-589 applications for Asylum. Nor do they
8 plan to, based on their unlawful and unauthorized policy change.

9 ADMINISTRATIVE REMEDIES HAVE BEEN EXHAUSTED

10 21. Plaintiffs have complied with Defendants' requirements
11 regarding applications for asylum to the USCIS. 8 CFR §208.1, et
12 seq.

13 22. Since Plaintiffs cannot appeal a decision that has not
14 been rendered and since federal law requires Plaintiffs to follow
15 the application process they are now following, Plaintiffs have no
16 adequate administrative or legal remedy available to them aside
17 from the application process which is the subject of this
18 complaint. Only relief in the nature of mandamus, declaratory and
19 injunctive relief will protect Plaintiffs from Defendants'
20 nonfeasance and misfeasance.

21 23. Pursuant to the APA a Court may "compel agency
22 action...unreasonably delayed." 5 USC §706(1). The Court may only
23 compel the agency to make a discrete action that it is required to
24 take. Norton v. S. Utah Wilderness All., 542 U.S.55, 64 (2004).

25 24. Although the Attorney General has the discretion to
26 grant or deny applications, that does not give rise to the
27 authority to simply never adjudicate an application. Nigmadzhanov
28 v. Mueller, 550 F.Supp. 2d 540, 546 (S.D.N.Y. 2008). With respect

1 to APA claims USCIS' argument that it does not have to adjudicate
2 an adjustment application "not only pushes the bounds of common
3 sense but is also contradicted by a wealth of authority from this
4 and other districts" (citations omitted). Soneji v. Dep't of
5 Homeland Sec., 525 F.Supp. 2d 1151, 1155 (N.D. Cal. 2007).

6 25. The Supreme Court has indicated that courts should
7 consider "agency regulations that have the force of law" in
8 determining whether agency action is required. Norton v. Southern
9 Utah Wilderness Alliance, 542 U.S. 55, 65 (2004). "Thus, when an
10 agency uses mandatory language like 'shall,' a court should find
11 that there is a legal duty to act." Ren v. Mueller, 2008 U.S.
12 Dist. LEXIS 4300, *22 (M.D. Fla. 2008)[6:07- cv-790-Orl-19DAB M.D.
13 Fla. 2008). The applicable regulation states: "The Service **shall**
14 adjudicate the claim of each asylum applicant whose application is
15 complete within the meaning of §208.3(c)(3) and is within the
16 jurisdiction of the Service." 8 C.F.R. §208.9(a)[Emphasis added].

17 TRAC FACTORS (Telecommunications Research & Action Center v.
18 FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984):

19 26. To evaluate whether an agency's delay is unreasonable
20 under the APA, the six factors announced in Telecommunications
21 Research & Action Center v. FCC, 750 F.2d 70, 79-80 ["TRAC"], are
22 reviewed:

23 (1) The time the agency takes to make a
24 decision must be governed by a "rule of
reason."

25 (2) Where Congress has provided a timetable or
26 other indication of the speed with which it
27 expects the agency to proceed in the enabling
28 statute, that statutory scheme may supply
content for this rule of reason.

1 (3) Delays that might be reasonable in the
2 sphere of economic regulation are less
3 tolerable when human health and welfare are at
stake.

4 (4) The court should consider the effect of
5 expediting delayed action on agency activities
of a higher or competing priority.

6 (5) The court should also take into account
7 the nature and extent of the interests
prejudiced by the delay.

8 (6) The court need not "find any impropriety
9 lurking behind agency lassitude in order to
hold that agency action is 'unreasonably
10 delayed.'" TRAC, 750 F.2d at 80.

11 27. Factor (1) the agency's delay must be governed by a rule
12 of reason. Plaintiff's I-589 application was filed with defendant
13 USCIS on September 17, 2015. It is now August of 2022. Thus, the
14 application has been pending for almost 7 years, or approximately
15 84 months. [Has] "the time for agency action been
16 reasonable...[r]epeatedly, courts in this and other circuits have
17 concluded that 'a reasonable time for agency action is typically
18 counted in weeks or months, not years.'" Nat. Res. Def. Council,
19 Inc. v. EPA, 956 F.3d 1134, 1139 (9th Cir. 2020). Just because a
20 delay is "not unusual" does not make it reasonable. See Jefrey v.
21 INS, 710 F.Supp. 486 (S.D.N.Y. 1989). This is considered the most
22 important factor but is not in itself determinative. A Cmty. Voice
23 v. EPA, 878 F.3d 779, 787 (9th Cir. 2017).

24 28. Factor (2) the timetable provided in the statute may
25 supply content to the rule of reason. 8 USC §1158(d)(5)(A)(1)(ii)
26 provides: "in the absence of exceptional circumstances, the
27 initial interview or hearing on the asylum application shall
28 commence not later than 45 days after the date an application is

1 filed..." Thus, in this situation Congress has provided a timeline,
2 specifically 45 days.

3 29. The statute states that the interview shall commence not
4 later than 45 days after the application is filed. "The word
5 'will,' like the word 'shall,' is a mandatory term unless
6 something in the context in which the word is used indicates
7 otherwise." Nat. Res. Def. Council, 956 F.3d at 1078. Thus, unless
8 there are exceptional circumstances, Congress expects that the
9 initial interview shall commence within 45 days of the application
10 being filed.

11 30. Plaintiffs recognize the COVID-19 pandemic as an
12 exceptional circumstance allowing for commencement of their
13 initial interview beyond the 45 days. However, the delay must
14 still be "reasonable." Plaintiffs' applications have been pending
15 for five and a half years or, in other words, approximately sixty-
16 six months before the pandemic began and now has been pending for
17 a total of seven and a half years, which cannot be considered
18 reasonable.

19 31. 8 USC §1158(d)(7), notwithstanding. This subsection
20 states: "Nothing in this subsection shall be construed to create
21 any substantive or procedural right or benefit that is legally
22 enforceable by any party against the United States or its agencies
23 or officers or any other person."

24 32. This limitation only applies to subsection (d) of
25 section 208. However, the right to apply for asylum is not based
26 in subsection (d), but subsection (a) and Plaintiffs have a claim
27 to an adjudication of their application within a reasonable time
28

1 under the APA. Alkassab v. Rodriguez, 2017 U.S. Dist. LEXIS 50110
2 (D.S.C. 2017) [2:16-cv-1267-RMG Dist. of South Carolina].

3 33. “[T]he Due Process Clause applies to all ‘persons’
4 within the United States, including aliens, whether their presence
5 here is lawful, unlawful, temporary, or permanent.” Zadvydas v.
6 Davies et al., 533 U.S. 678, 693 (2001).

7 34. Statutes must be interpreted so as to avoid serious
8 constitutional questions. Zadvydas, at 688-702 (2001); see also
9 Clark v. Martinez, 543 U.S. 371 (2005)[re: inadmissible persons].

10 35. “[I]t is a cardinal principle’ of statutory
11 interpretation, however, that when an Act of Congress raises ‘a
12 serious doubt’ as to its constitutionality, ‘this Court will first
13 ascertain whether a construction of the statute is fairly possible
14 by which the question may be avoided.’ Crowell v. Benson, 285 U.
15 S. 22, 62 (1932); see also United States v. X-Citement Video,
16 Inc., 513 U. S. 64, 78 (1994); United States v. Jin Fuey Moy, 241
17 U. S. 394, 401 (1916); cf. Almendarez-Torres v. United States, 523
18 U. S. 224, 238 (1998) (construction of statute that avoids
19 invalidation best reflects congressional will). We have read
20 significant limitations into other immigration statutes in order
21 to avoid their constitutional invalidation. See United States v.
22 Witkovich, 353 U. S. 194, 195, 202 (1957)...”

23 36. In December of 2014, Defendant USCIS implemented First-
24 in, First-out (“FIFO”) processing, meaning that asylum applicants
25 would be scheduled for interviews in the order that the
26 applications were filed. On January 28, 2018, Defendant USCIS
27 implemented Last-in, First-out (“LIFO”) processing, meaning that
28 the most recent applications would be scheduled for interviews

1 before earlier filed applications. Thus, meaning that the earlier
2 filed applications would stagnate and continue to languish.

3 37. Plaintiffs filed their I-589 asylum application on
4 September 17, 2015, after December 2014, but before January 28,
5 2018, and Defendants did not inform them of this change in policy
6 nor that it would apply to their application.

7 38. Defendants have the authority to change implementing
8 regulations to the statute via the APA. However, Defendants did
9 not properly exercise this authority by publishing proposed
10 changes in the Federal Register and allowing for public comment as
11 required by the APA.

12 39. Defendants, thus, did not properly exercise their
13 authority under the APA, violating their duty under that statute.
14 In addition, Defendants did not inform Plaintiffs that although
15 they filed their application as a time when FIFO (First-in, First-
16 out) processing was in effect, the new LIFO (Last-in, First-out)
17 would be applied to them, in effect, stopping their forward
18 progress through the line dead in its tracks, thereby violating
19 Plaintiffs' due process rights under the 5th amendment to the U.S.
20 Constitution.

21 40. Factor (3) delays are less tolerable when human health
22 and welfare are at stake. As a result of Defendants' inaction
23 Plaintiffs have been unlawfully deprived of a timely determination
24 of their I-589 application for asylum. Due to Defendants' failure
25 to timely make a decision on Plaintiffs' application, Plaintiff
26 has been unlawfully deprived of the opportunity to timely obtain
27 the substantial and unique benefits of asylum status.

28

1 41. Plaintiffs has suffered and will suffer irreparable harm
2 because of Defendants' nonfeasance and misfeasance. Such harm
3 includes, but is not limited to, deprivation of the substantial
4 and unique benefits, including protection of asylum status
5 including protection under the laws of the United States; the
6 right to enter and remain in the United States; freedom of
7 movement and travel; the right to obtain and retain employment in
8 the United States without having to continually renew employment
9 authorization; and the right to eventually apply for lawful
10 permanent residence. Plaintiffs has also been subject to fear,
11 despair, preoccupation and uncertainty engendered by her inability
12 to obtain lawful asylum status, the inability to travel and carry
13 out necessary activities, because of the long- delayed decision on
14 her application.

15 42. Factor (4) the Court should consider the effect of
16 expediting delayed action on the agency's activities of a higher
17 or competing priority.

18 43. Although Defendants may argue that this policy was
19 necessary at a resource-allocation issue their own words defy this
20 notion: "This priority approach...seeks to deter those who might try
21 to use the existing backlog as a means to obtain employment
22 authorization. Returning to a 'last in, first out' interview
23 schedule will allow USCIS to identify frivolous, fraudulent or
24 otherwise non-meritorious asylum claims earlier and place those
25 individuals into removal proceedings." A copy of the archived
26 notice: USCIS to Take Action to Address Asylum Backlog last
27 updated 02/02/2018 attached hereto as Exhibit C.

28

1 44. Factor (5) the Court should take into account the nature
2 and extent of the interests prejudiced by the delay. The nature
3 and extent of the prejudice suffered by Plaintiffs is laid out in
4 paragraphs 38-41 inclusive.

5 45. Factor (6) the Court need not find any impropriety
6 behind the agency's delay in order to hold that action has been
7 delayed unreasonably.

8 46. An order in Mandamus requiring Defendants to give
9 Plaintiffs an asylum interview will not put them at the head of
10 the queue and simply push all others back one space; their
11 unlawful policy change of LIFO (last-in, first-out) practically
12 guarantees that they would never get a space in the queue and
13 never move anywhere. Cf. In re Barr Lab'ys, Inc., 930 F.2d 72,
14 1975-76 (D.C. Cir. 1991).

15 ...the fact that the relevant agencies lack
16 sufficient resources to timely process
17 all...applications is ultimately a problem for
18 the political branches...It is not the aggrieved
19 applicants who have created this problem, and
20 it would not be appropriate for the courts to
21 shift the burdens of this...onto the shoulders
22 of individual immigrants. Zhou v. FBI Director,
23 2008 U.S. Dist. LEXIS 46186 *22) [07-cv-238-PB
24 D.N.H. 2008, Op.No. 2008 DNH 115].

21 See Tang v. Chertoff, 493 F.Supp. 2d 148, 158 (D.Mass. 2007) [The
22 lack of agency resources is a "policy crisis" but "it is not
23 plaintiffs who ask the Court to take on the burden of remedying
24 this crisis. Rather, it is defendants who ask the Court to relieve
25 the pressure by excusing them from their statutory duty and
26 letting the cost fall on immigrant plaintiffs." See also, Galvez v.

1 Howerton, 503 F.Supp. 35, 39 (C.D.Cal. 1980); Jianhua Dong v.
2 Chertoff, 513 F.Supp. 2d 1158, 1171-72 (N.D.Cal. 2007).

3 FIRST CLAIM FOR RELIEF

4 47. Plaintiffs incorporate by this reference and re-alleges
5 as though fully set forth herein the allegations of paragraphs
6 through 46 inclusive.

7 48. Defendants' knowing, reckless and negligent engagement
8 in a pattern and practice of unjustified delays in handling the
9 administrative matters before them violates Defendants'
10 nondiscretionary duty under the INA, and the APA, owed to
11 Plaintiff and other similarly situated persons, to conclude
12 matters presented to them within the timeframe prescribed by law
13 or at a minimum a reasonable time and with due regard for the
14 convenience and necessity of the parties.

15 49. Defendants' unauthorized and unlawful creation and use
16 of the procedure of LIFO (last-in, first-out), meaning that other
17 asylum (I-589) application filed after Plaintiffs' will be
18 processed and adjudicated while Plaintiffs' application will
19 remain pending and stagnant. Defendants created this procedure
20 without lawful authority and in violation of the rule making
21 process under the APA; not allowing for notice and comment to the
22 public. Moreover, Plaintiffs were not notified that this procedure
23 would be applied to their applications after filing their
24 application(s) with Defendant USCIS on September 17, 2015. The
25 LIFO procedure was implemented on 01/28/2018, after Plaintiffs had
26 filed their application. This action by Defendants is a violation
27 of Plaintiffs' rights to due process of law under the 5th Amendment
28 to the U.S. Constitution.

SECOND CLAIM FOR RELIEF

50. Plaintiffs incorporates by this reference and re-allege as though fully set forth herein the allegations of paragraphs through 49 inclusive.

51. Defendants' knowing, reckless and negligent engagement in a pattern and practice of unjustified delays in handling the matters before it violates Plaintiffs' right, and the right of similarly situated persons, to due process of law, as guaranteed by the 5th amendment to the U.S. Constitution.

WHEREFORE, in light of the foregoing, Plaintiffs respectfully requests that the Defendants be cited to appear herein, and that this Court enter orders, as to each of them, as follows:

1. Declaratory judgment, pursuant to 28 USC §§2201-2202, declaring the rights and duties of Plaintiffs and Defendants;
2. require Defendants to adjudicate Plaintiffs' application for asylum;
3. award Plaintiffs reasonable attorney's fees, related to expenses and costs; and
4. grant such further relief at law and in equity as justice may require or such other relief as the Court may deem just and proper.

DATED: August 8, 2022

Respectfully submitted,

/s/Hanzhang Xu
Hanzhang Xu,
Counsel for Plaintiffs